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CITATIONS

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Statutes:

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

SAFE HARBOR WATER POWER CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above case on December 2, 1941.

OPINIONS BELOW

The opinions of the Federal Power Commission are found at R. Vol. I, pp. 22–46. The opinion of the Circuit Court of Appeals (R. Vol. I, pp. 668–679) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1941 (R. Vol. I, pp. 679–680). The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Sec. 313 (b) of the Federal Power Act.

QUESTIONS PRESENTED

The question presented is whether the Federal Power Commission has jurisdiction to regulate interstate wholesale rates of a licensed hydroelectric project under Section 20 of Part I of the Federal Power Act irrespective of whether the states concerned have provided a commission or have been unable to agree on such rates. Determination of this question requires an inquiry into—

(1) Whether Section 20 of Part I of the Federal Power Act is a manifestation of congressional consent to the regulation of interstate wholesale rates by the interested states.

(2) If not, whether the jurisdiction of the Federal Commission is made dependent upon the failure of the states to provide a commission or agree on rates even in fields where the states lack constitutional power.[1]

STATUTES INVOLVED

Section 20 of Part I of the Federal Power Act of 1935 (16 U. S. C. sec. 813), formerly Section

[1] In the event that this petition is granted, the Government will urge that the merits of the rate order issued by the Commission should be decided by this Court, and that the rate order is in all respects valid.

20 of the Federal Water Power Act of 1920 (41 Stat. 1073), provides as follows:

> SEC. 20. That when said power [generated by a licensee] or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the

provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or

allowed for the rights granted by the commission or by this Act.

The pertinent portions of Sections 14 and 201 of the Federal Power Act of 1935 (49 Stat. 844, 847, 16 U. S. C. secs. 807, 824) are set forth in Appendix A, *infra,* pp. 20–21.

STATEMENT

The Safe Harbor Water Power Corporation, a Pennsylvania corporation (R. Vol. I, p. 61) owns and operates a large hydroelectric project on the Susquehanna River near Lancaster, Pennsylvania, under a 50-year license issued in 1930 by the Federal Power Commission (R. Vol. I, pp. 22–23; R. Vol. II, p. 6). The only property owned by Safe Harbor is a dam and power plant and the usual related structures (R. Vol. I, pp. 71–72). Under a contract expiring in 1980, Safe Harbor sells its entire output of electric energy at wholesale to its parent companies, the Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter called the Baltimore company) and the Pennsylvania Water and Power Company of Holtwood, Pennsylvania (hereinafter called the Holtwood company). (R. Vol. II, pp. 57–77). The parent companies are entitled to electric energy from Safe Harbor in proportion to their stock ownership in the Safe Harbor Company, the Baltimore company receiving two-thirds and the Holtwood company receiving one-third of Safe Harbor's output (R. Vol. I, pp. 72, 73, 77; R. Vol. II, pp. 60–61.)

The two-thirds of the output to which the Baltimore company is entitled is delivered to it at Baltimore and Takoma Park, Maryland, and is distributed to the consumers principally in Baltimore (R. Vol. I, pp. 73, 77; R. Vol. II, pp. 59–77)[2] The other one-third is delivered at the project site to the Holtwood company (R. Vol. II, p. 70), which transmits and sells most of it at wholesale to the Baltimore company at the Baltimore and Takoma Park delivery points (R. Vol. II, pp. 59–77), and sells the remainder to the Pennsylvania Railroad and to several Pennsylvania distributing companies (R. Vol. I, p. 82). Approximately 90 percent of the product of Safe Harbor is sold at wholesale in interstate commerce (Exh. 18, p. 44).

Section 20 of Part I of the Federal Power Act of 1935, originally enacted as Section 20 of the Federal Water Power Act of 1920, confers jurisdiction upon the Federal Power Commission to regulate the rates charged by the licensees for power entering "interstate commerce" in the event that (a) any interested state fails to provide a commission to regulate such rates, or (b) the constituted state authorities fail to agree as to the licensee's rates, service, or security issues. Section 20 further directs the Commission

[2] The transmission lines over which the energy is delivered to the Baltimore company are owned and operated by the Holtwood company (R. Vol. II, pp. 66–67, 75–76).

to value the licensee's properties on a net investment basis.[3] Part II of the Federal Power Act authorizes the Commission to regulate interstate "wholesale" rates of all electric utilities (secs. 201 (b), 206), but limits the jurisdiction of the Commission "to those matters which are not subject to regulation by the States" (sec. 201 (a)), and does not in terms fix any basis of valuation other than that which the Constitution may be deemed to require (cf. sec. 208).

On November 9, 1937, the Federal Power Commission upon its own motion instituted an investigation to determine whether the rates charged by Safe Harbor to its parents "for or in connection with the transmission or sale of electric

[3] The Public Utility Code of Pennsylvania (Purdon's Penna. Stat. Ann. (1941), Tit. 66, sec. 1532) provides that its provisions shall not be construed to apply to interstate commerce "except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."

The Maryland statute (Ann. Code of Md. (1939), Art. 23, sec. 427) provides as follows:

"The provisions of this sub-title shall apply to services or utilities rendered by any of the corporations or persons subject to the provisions hereof, or any of the same, within the State of Maryland, and shall not be so construed as to extend to any matter or thing which, under the Federal Constitution, the Congress of the United States has the exclusive power to regulate, or which the Congress of the United States has, in conformity with said Constitution, and in the exercise of its concurrent power, in fact regulated, to the exclusion of the concurrent power of the several States."

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energy, subject to the jurisdiction of the Commission" were unduly preferential, unreasonable, or otherwise in violation of the provisions of the Federal Power Act (R. Vol. I, pp. 48–50). On July 14, 1939, the Commission ordered a hearing to determine whether the contract mentioned above violated any of the provisions of Parts I and III of the Federal Power Act or any rule of the Commission thereunder, or whether any of Safe Harbor's rates "for the sale of electric energy" to the Baltimore company and the Holtwood company were unjust, unreasonable, or unduly discriminatory, and to determine the just and reasonable rates and fix the same by order (R. Vol. I, pp. 50–51).

Public hearings were held in October and November of 1939, and, on July 11, 1940, the Commission entered an order requiring Safe Harbor to reduce its wholesale rate for electricity approximately $350,000 annually (R. Vol. I, pp. 41–42). The rate base adopted by the Commission was the statutory base of net investment prescribed in Sections 20 and 14 of Part I of the Federal Power Act. The Commission pointed out that although it had "jurisdiction over the rate here by virtue of its authority under Part II of the Federal Power Act, which provides for the regulation of 'the sale of electric energy at wholesale in interstate commerce,' the Commission has asserted its jurisdiction in this case under Part I of the Federal Power Act which applies to licensed projects"

(R. Vol. I, p. 24). The Commission made no finding that the public service commissions of Maryland and Pennsylvania were unable to agree as to the interstate wholesale rates to be charged by the respondent and there is no evidence in the record on this point.

On petition for review (R. Vol. I, pp. 1–21), the Circuit Court of Appeals, without passing upon the merits of the Commission's order, held that the Commission had exceeded its jurisdiction. The court held that Section 20 constitutes congressional consent to the formation of state compacts for cooperative local regulation of interstate rates and conferred jurisdiction on the Commission only in the event that the interested state commissions are unable to agree on the rates to be charged (R. Vol. I, pp. 668–679).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding the Federal Power Commission to be without jurisdiction under Part I of the Federal Power Act to fix interstate wholesale rates for licensed hydroelectric projects in the absence of a finding that the commissions of the interested states had been unable to agree on such rates.

2. In holding that Section 20 of Part I of the Federal Power Act of 1935 gives the consent of Congress to the formation of compacts for cooperative state regulation of interstate wholesale

electric rates charged by a licensee of the Federal Power Commission.

3. In setting aside and failing to enforce the order of the Federal Power Commission.

REASONS FOR GRANTING THE WRIT

1. This case is both novel and important in that it is the first case involving the authority of the Federal Power Commission to fix interstate wholesale electric rates for licensed water power projects under Part I of the Federal Power Act.

This Court has held that the states lack constitutional power to fix interstate wholesale rates (*Missouri* v *Kansas Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83), although interstate retail rates, being regarded as local matters, are subject to state regulation (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; *Public Utilities Commission* v. *Landon*, 249 U. S. 236). The court below held that the Federal Power Act enlarges the authority of the states so that they may regulate both wholesale and retail interstate rates for federally licensed projects.[1] We think, on the

[1] The court below held that the Power Act authorized the State Commissions to agree on interstate rates through compacts. But there is considerable doubt as to whether the State Commissions are vested with such authority. The General Solicitor of the National Association of Railroad and Utilities Commissioners, in commenting upon what he termed the "strange opinion" of the court below, has noted

contrary, that Congress merely refrained from depriving the states of the power over interstate commerce which they already possessed over interstate retail rates. This issue, as applied to the water power projects licensed by the Federal Power Commission, is of obvious public importance.

The question of the proper construction of Section 20 is of importance for the further reason that upon it may depend the basis for valuation of the licensed projects for rate-making purposes. Section 20 read together with Section 14 provides that no value shall be "claimed by the licensee or allowed by the commission" in excess of net investment, a condition of the license of undoubted validity. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 427–428. Under Part II of the Federal Power Act, which applies to all interstate wholesale electric rates, licensed or unlicensed, as well as under state regulation, the utilities invariably contend that the rates must constitutionally be established upon the basis of "fair value," as long as *Smyth* v. *Ames*, 169 U. S. 466, is not overruled. The construction given to Section 20 may thus have an effect upon whether

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that the state commissions, operating under laws providing that rates "must be determined upon evidence offered in due process of law hearings," might have difficulty in fixing rates by compact. See National Association of Railroad and Utilities Commissioners Bulletin, No. 156—1941.

a "definite, stable, and readily ascertainable" (R. Vol. I, p. 39) rate base may be adopted in the regulation of the interstate wholesale rates of licensed projects or whether the "delusive" fair value rule must continue to be applied notwithstanding the "insuperable obstacles" (*ibid.*) which have been encountered thereunder.[5]

The decision below may also affect the scope and operation of Part II of the Act, and thus restrict the Commission's power over all interstate rates. For if the decision below is not set aside, it will undoubtedly be argued by the utilities that the declaration in Section 201 (a) of Part II limiting federal regulation "to those matters which are not subject to regulation by the States" incorporates by reference all authority held to have been vested in the states by Part I as construed by the court below. Moreover, licensed and unlicensed projects are frequently integrated into a single interstate system. In such circumstances the decision below would impair effective regulation, since it would seem to permit state regulation of licensed hydroelectric projects and separate federal regulation of steam plants and non-licensed water power developments.

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[5] See brief for the Federal Power Commission and the Illinois Commerce Commission in *Federal Power Commission and Illinois Commerce Commission* v. *Natural Gas Pipeline Company of America et al.*, Nos. 265 and 268, this Term.

2. Section 20 provides that "whenever any of the States directly concerned has not provided a Commission or other authority" to enforce reasonable rates, "or such states are unable to agree through their properly constituted authorities * * * on the rates or charges of payment," jurisdiction is conferred upon the Federal Power Commission to regulate interstate electric rates. Respondent has contended (a) that this language divests the Federal Commission of power, once a State Commission is established, even over those subjects as to which the State Commissions are constitutionally impotent; and (b) in the alternative, that the language quoted is "congressional" permission overcoming any constitutional barrier to state action. The court below rejected the first contention, but accepted the second. Both, we believe, are demonstrably unsound.

(a) Although respondent's first argument may be said to find some support in the statute read literally, the court below termed it a "curious emasculation" (R. Vol. I, p. 674). Plainly, as the court declared, Congress intended that "there should be regulation and control of hydroelectrical energy and not that impotent public bodies would be set up by the states to go through the motions of regulation"; "the debates and reports indicate quite clearly that Congress" was not making "vain gestures" (R. Vol. I, p. 674). Other language in the statute, as well as its legislative history, demon-

strates that the law was not designed to make the authority of the Federal Commission dependent upon unconstitutional, and therefore futile, state proceedings. Cf. *United States* v. *Rosenblum Truck Lines, Inc.*, Nos. 52, 53, Oct. Term, 1941, decided Jan. 19, 1942, slip sheet p. 5; *United States* v. *American Trucking Associations,* 310 U. S. 534, 544; *United States* v. *Dickerson,* 310 U. S. 554, 561–562. Since the decision below is in accord with our position on this point, it is unnecessary to dwell upon it further in this petition.

(b) The respondent and the court below conceded that, under the *Kansas Gas* and *Attleboro* cases (p. 10, *supra*) in the silence of Congress the states lack power to regulate interstate wholesale utility rates. That this assumption was correct appears from the fact that Congress enacted the Federal Power Act in 1920 and reenacted it in 1935 with the doctrine for which these cases stand expressly in view.[8] But the Circuit Court of Appeals accepted respondent's argument that Section 20 contained an affirmative grant of authority to the states, and thus enlarged the

[8] The hearings on the bills which became the 1920 Act disclosed that Congressmen were inclined to believe that the rule precluding the states from fixing interstate railroad rates would be applicable to interstate power rates. Hearings Before the Committee on Water Power of the House of Representatives, 65th Cong., 2d sess., pp. 66–69, 102. The 1935 Act permitting federal regulation of all interstate wholesale rates was adopted for the express purpose of meeting the hiatus created by this Court's prior decisions.

power which they possessed while Congress was silent.

This conclusion is unwarranted either by the words of the statute or its history. The language, in the first place, is purely negative, and is not expressed in terms of grant. It thus differs from the other statutes cited by respondent in which Congress has expressly sanctioned the application of state power to interstate transactions,[7] as well as from the practice of Congress in giving express and formal approval to interstate compacts.[8]

The text of the statute is, we submit, more consistent with the view that Congress merely intended to leave untouched the jurisdiction which the states lawfully had and in substantial measure

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H. Rep. No. 1318, 74th Cong., 1st sess., pp. 7–8, 26–27; S. Rep. No. 621, 74th Cong., 1st sess., pp. 17–18, 48. These reports show that the 1935 Act was predicated on the assumption that the *Attleboro* case definitely negatived the power of the states over wholesale interstate rates. Since the question here is one of the intention of Congress, this assumption as to the scope of state constitutional power must be given effect. *Parker* v. *Motor Boat Sales, Inc.*, No. 46, this Term; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, No. 100, this Term.

[7] For cases discussing such statutes see *In re Rahrer*, 140 U. S. 545, 549, 562; *Whitfield* v. *Ohio*, 297 U. S. 431, 434, 440; Cf. *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 321, 332; *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334, 343, 351.

[8] E. g. *Olin* v. *Kitzmiller*, 259 U. S. 260, 262; *Arizona* v. *California*, 283 U. S. 423, 449; cf. *United States* v. *Arizona*, 295 U. S. 174, 183; see also Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717j (a).

were exercising over interstate retail rates at the time the Act was under consideration. Nothing in the legislative history preceding the passage of the original Act in 1920 suggests that anyone had in mind *expansion* of state power. The general remarks referred to by the court below (R. Vol. I, p. 675) are entirely consistent with the view that the states were to be permitted to exercise the power which they already possessed and nothing more. And there were repeated statements, supporting this interpretation, that the legislation did not divest the state commissions of any power[9] and that jurisdiction was to be "left" with, not given to, the state authorities.[10] Doubt was expressed as to the constitutional jurisdiction of the states, but no intention to enlarge it appears (58 Cong. Rec. 2239).

In 1929, after the *Kansas Gas* and *Attleboro* decisions, the Power Commission approved a formal opinion of its chief counsel that Section 20 permitted the Commission to regulate wholesale interstate rates irrespective of state action, inasmuch as the states lacked power over that subject. Ninth Annual Report of the Federal Power Commission to Congress (1929), pp. 89–90, 119–131. This opinion specifically states that Congress

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[9] Hearings before Committee on Water Power of the House of Representatives, 65th Cong., 2d Sess., p. 66.

[10] *Id.*, pp. 66, 99, 101. See also 58 Cong. Rec. 2239, 59 *id.* 6537.

had not, in Section 20, affirmatively granted consent to any state compacts. *Id.,* at pp. 128–129. This administrative interpretation was reported to Congress when made,[11] and also called to Congressional attention before Section 20 was reenacted in 1935.[12] This administrative construction in itself is entitled to weight, and the reenactment of the law without change after such interpretation was made known to the legislature is a strong indication that the reenacting Congress approved of it. Cf. *United States* v. *American Trucking Associations,* 310 U. S. 534, 549–550.[13]

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[11] The opinion was set forth in full in the Ninth Annual Report to Congress.

[12] See the statement of the Solicitor for the Federal Power Commission in Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., p. 510.

[13] Many cases in this Court hold that reenactment of a statute manifests approval of prior administrative rulings even if they are not shown to have been called to the attention of the legislature. E. g. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *Morgan* v. *Commissioner,* 309 U. S. 78, 81; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 293–294. Although secondary authorities have disagreed as to the weight to be given an administrative interpretation when there was no evidence that a reenacting Congress was aware of it, all agree that if the construction is known to the legislature reenacting the statute it should be given considerable weight. See Feller, *Addendum to the Regulations Problem,* 54 Harv. L. Rev. 1311, and articles cited; Griswold, *Postscriptum,* 54 Harv. L. Rev. 1323.

Any doubts as to the meaning of Section 20 when originally enacted are dispelled by the manifestation of Congressional understanding when the Federal Power Act was revised in 1935. Section 20 itself remained untouched. But the statements in the Committee Reports that the *Attleboro* case "placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the states" (S. Rep. No. 621, 74th Cong., 1st Sess., p. 17; *id.*, p. 48; H. Rept. No. 1318, 74th Cong., 1st Sess., pp. 7–8, 26–27) can hardly be reconciled with the notion that Congress had made the *Attleboro* doctrine inapplicable by its prior consent to state jurisdiction for federally licensed projects.[14] And even though the references to the *Attleboro* doctrine were in the portion of the Committee Reports describing Part II of the Act rather than Section 20, it is not reasonable to suppose that Congress intended the Commission to have less and the states more power over projects operating under federal licenses than over those which were not.

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[14] The representative of the state public utilities commissions admitted that the states had no constitutional power to regulate interstate wholesale rates, and urged the need for federal control of such rates. Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 756–757; Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., p. 1622.

CONCLUSION

It is important that this Court resolve all doubts as to the meaning of Section 20 and as to the respective powers of the Federal Power Commission and the state commissions over interstate electric rates. The decision below will defeat the intention of Congress that interstate wholesale rates of licensed projects be effectively regulated. For these reasons it is respectfully requested that this petition for a writ of certiorari be granted.

CHARLES FAHY,
Solicitor General.

RICHARD J. CONNOR,
General Counsel,
Federal Power Commission.

FEBRUARY 1942.

APPENDIX

Section 14 of the Federal Power Act, as amended, 49 Stat. 844, 16 U. S. C., Sec. 807, reads as follows:

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any,

shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 201 of the Federal Power Act of 1935 (49 Stat. 847, 16 U. S. C. sec. 824) provides as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy

in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1942

(27)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 987.

FEDERAL POWER COMMISSION,
Petitioner,

v.

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Respondent.

MEMORANDUM OF COUNSEL FOR PUBLIC SERVICE COMMISSION OF MARYLAND, AMICUS CURIAE, IN SUPPORT OF FEDERAL POWER COMMISSION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOSEPH SHERBOW,
General Counsel,
Public Service Commission
of Maryland, Amicus Curiae.

The Daily Record Co. Print, Baltimore.

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Counsel for the Public Service Commission of Maryland as *amicus curiae,* pursuant to Rule 27(9), asks this Court to issue a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit in this case.

JURISDICTION OF THIS COURT.

The decision of the lower court was rendered on December 2, 1941. The jurisdiction of this Court attaches by virtue of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 313(b) of the Federal Power Act.

OPINIONS.

The Opinion of the Federal Power Commission is reported in 34 P. U. R. (N. S.) 236 and the Opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 800.

INTEREST OF THE PUBLIC SERVICE COMMISSION OF MARYLAND.

Two-thirds of the entire output of Safe Harbor's hydroelectric project is sold at wholesale in interstate commerce directly to the Consolidated Gas Electric Light and Power Company of Baltimore which sells electricity to consumers in Maryland. The electric rates paid by the Maryland consumers to the Baltimore Company are affected by the cost of the power that Company obtains from Safe Harbor. The decision of the Court below will frustrate effective complementary Federal and State regulation and will impair the interests of the ultimate consumers in Maryland.

QUESTIONS PRESENTED.

1. Does the Federal Power Commission have jurisdiction to regulate the interstate wholesale rates of a federally licensed hydroelectric project under the Federal Power Act?
2. Will the rate fixed by the Federal Power Commission for the licensed Safe Harbor hydroelectric project result in confiscation?

STATUTES INVOLVED.

The Federal Power Act (41 Stat. 1073, 49 Stat. 847, 16 U. S. C. A. 791) authorizes the Federal Power Commission to fix the interstate wholesale rates of all electric utilities including federally licensed hydroelectric projects under the following pertinent provisions of Section 201:

> "(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation * * * of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> (b) The provisions of this Part shall apply * * * to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy * * *.
>
> (c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof * * *.
>
> (d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale."

The Federal Power Act also authorizes the Federal Power Commission to prescribe the interstate wholesale rates of licensed hydroelectric projects under Section 20 which also contains the rate base provision for licensees. The Federal Power Commission elected to assert its jurisdiction in this case under Section 20. The relevant provisions of Section 20 are:

> "That when said power or any part thereof (generated by a licensed hydroelectric project) shall enter

into interstate or foreign commerce the rates charged * * * by any such licensee * * * shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable, discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission * * * upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

"In any valuation of the property of any licensee hereunder for the purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States * * *."[1]

Since the Circuit Court of Appeals placed its decision upon what we contend was an erroneous and narrow construction of Section 20, the Congressional plan for Federal rate regulation to supplement State regulation is challenged and consequently the scope and purpose of the entire Federal Power Act are involved.

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[1] Section 14 provides that the United States "shall pay the net investment of the licensee in the project * * * not to exceed the fair value of the property taken * * *. Such net investment shall not include or be affected * * * by the license or by good will, going value, or prospective revenues * * *." Section 3(13) defines net investment.

STATEMENT OF THE CASE.

The Consolidated Gas Electric Light and Power Company of Baltimore furnishes electrical energy to consumers in Baltimore City and a large surrounding area. Safe Harbor Water Power Corporation operates a large hydroelectric project on the Susquehanna River in Pennsylvania under Federal Power Commission License No. 1025.

The Baltimore Company owns two-thirds of the capital stock of the Safe Harbor Water Power Corporation and the remaining one-third is owned by Pennsylvania Water and Power Company. Nearly all of the energy generated at Safe Harbor is sold to the Baltimore Company as a result of various agreements between these corporations. By contract between the parties the cost of the energy is an amount which yields to the Safe Harbor Corporation a net income of seven per cent annually on its gross investment, irrespective of the actual amount of electric energy produced.

The Federal Power Commission instituted an investigation to determine among other things whether the rates charged by Safe Harbor Water Power Corporation were unjust, unreasonable or unduly discriminatory and to determine just and reasonable rates.

On September 19, 1939, by order of the Commission I was permitted to intervene and become a party to the proceeding in my capacity then as People's Counsel to the Public Service Commission of Maryland. I participated in the hearing and filed a brief urging the Federal Power Commission to reduce the interstate wholesale rates of Safe Harbor.

The Commission, by its final order in the case, found a statutory rate base and allowed a six per cent rate of return thereon, resulting in a reduction of approximately

$350,000 in the wholesale rate for electricity. *(Re: Safe Harbor Water Power Corporation,* 34 P. U. R. (N. S.) 236).

The Safe Harbor Corporation petitioned the United States Circuit Court of Appeals for the Third Circuit to review and to set aside the Commission's order. I filed a brief as *amicus curiae* in the Circuit Court of Appeals urging that the only agency with authority to regulate the interstate wholesale rates of Safe Harbor is the Federal Power Commission and that the rate order did not result in confiscation.

The Circuit Court of Appeals set aside the Federal Power Commission's order for want of jurisdiction under Section 20 and consequently did not determine whether confiscation will result from the rate order. The Circuit Court of Appeals interpreted Section 20 of the Federal Power Act as granting Congressional consent in advance to all compacts between the States for the regulation of the interstate transactions of federally licensed hydroelectric projects.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This is a case of first impression involving an important question of law with respect to the jurisdiction of the Federal Power Commission over interstate wholesale rates of a federally licensed hydroelectric project under the Federal Power Act. The decision of the Court below is confusing and seems to be in conflict with decisions of this Court. It is desirable in the public interest that this Court settle this case.

The State Commissions asked Congress to occupy the field with respect to regulation of interstate wholesale rates which this Court has repeatedly held to be free from State regulation. *Missouri v. Kansas Gas Co.,* 265 U. S. 298;

Public Utilities Commission v. Attleboro Co., 273 U. S. 83; *State Commission v. Wichita Gas Co.*, 290 U. S. 561; cf. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, No. 100, decided this Term. The Federal Power Act is a comprehensive plan of federal regulation of the national aspects of this interstate commerce to supplement and make effective the regulation of retail rates to ultimate consumers by State commissions.

The Lower Court's decision, if not corrected, will produce unreasonable results. Of course, Maryland and Pennsylvania are without constitutional power to regulate interstate wholesale rates individually, so they could not act jointly. But under the decision of the Circuit Court the interstate wholesale rates of a federally licensed hydroelectric project would be subject to regulation by cumbersome interstate compacts while like rates of an unlicensed hydroelectric project or a steam plant would be subject to regulation by the Federal Power Commission under Section 201 of the Act.

Another actual case will show how the Congressional objective to obtain effective regulation would be impaired. Pennsylvania Water and Power Company buys electric energy from licensee Safe Harbor and mixes it with electric energy generated by its unlicensed hydroelectric project and steam plant in Pennsylvania and this commingled electricity is transmitted and sold at wholesale to the Baltimore Company in Maryland. It is impossible to identify the sources of generation of this interstate wholesale sale of mixed electric energy. But if it were possible to identify those sources of generation, the Circuit Court's decision would compel interstate compact regulation by Maryland and Pennsylvania of that portion generated by the Safe Harbor licensed hydroelectric project and Federal Power Commission regulation of the remainder composed of un-

licensed hydro-and-steam generated electric energy. Surely Congress did not intend such an impracticable mode of regulating interstate wholesale rates of electric utilities. Manifestly the decision of the Court below would defeat the purpose of Congress to promote effective regulation. *Helvering v. New York Trust Co.*, 292 U. S. 455, 464-465.

How could the Public Service Commission of Maryland regulate the interstate wholesale rate of the safe Harbor Water Power Corporation? It is a foreign corporation and no part of its property is in and none of its operations are conducted in the State of Maryland. If the local commission would attempt to make any examination of the books, records and accounts of the company for the purpose of determining the propriety of the operating expenses, depreciation charges, taxes, maintenance, and general expenses, all of which charges form part of the annual power bill paid to that Company by the Baltimore Company, it would be the first to allege invasion of the federal field and cite this Court's decision in the *Attleboro* case, *supra*.

It is far better, if interstate wholesale rates, which this Court described as essentially national, are to be regulated at all that "regulation should be prescribed by a single authority" like the Federal Power Commission. *Minnesota Rate Cases*, 230 U. S. 352, 399.

It is respectfully requested in the public interest that the petition for a writ of certiorari be granted in this case, that the Federal Power Commission's jurisdiction be sustained and its rate order affirmed.

JOSEPH SHERBOW,
General Counsel,
Public Service Commission
of Maryland, Amicus Curiae.

March, 1942.

AFFIDAVIT OF SERVICE.

Joseph Sherbow, being first duly sworn, deposes and says that he served counsel of record with the attached Memorandum in Support of Federal Power Commission's Petition For A Writ of Certiorari To The United States Circuit Court of Appeals For The Third Circuit, by mailing copies properly addressd to:

Charles Markell,
First National Bank Bldg.
Baltimore, Maryland.

Edwin M. Sturtevant,
Lexington Building,
Baltimore, Maryland.

George T. Hambright,
56 Duke Street,
Lancaster, Penna.

Charles Fahy,
Solicitor General,
Justice Department,
Washington, D. C.

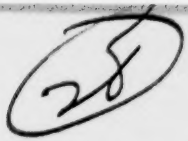
Richard J. Connor,
General Counsel,
Federal Power Commission,
Washington, D. C.

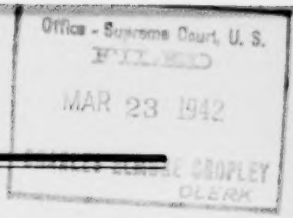
JOSEPH SHERBOW,

STATE OF MARYLAND
CITY OF BALTIMORE, TO WIT } SS.

Subscribed and sworn to before me this 9th day of March, 1942.

HARRIETT BLASER,
Notary Public.





IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 987.

FEDERAL POWER COMMISSION,
Petitioner,

v.

SAFE HARBOR WATER POWER CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

GEORGE T. HAMBRIGHT,
CHARLES MARKELL,
E. M. STURTEVANT,
Counsel for Respondent.

The Daily Record Co. Print, Baltimore.

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OPINION BELOW.

The opinion of the lower Court [R., Vol. I, 668-679] is reported as *Safe Harbor Water Power Corporation v. Federal Power Commission*, 124 F. 2d 800.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act [U. S. Code, Title 16, §825 l] and Section 240(a) of the Judicial Code, as amended [U. S. Code, Title 28, §347(a)].

QUESTION PRESENTED.

The question now presented is:

Whether Section 20 of the Federal Power Act confers upon the Federal Power Commission (hereinafter called the Commission) jurisdiction to regulate a licensee's rates when [1] each of "the States directly concerned" *has* "provided a commission * * * to enforce the requirements of this section within such State" and [2] "such States are" *not* "unable to agree through their properly constituted authorities * * * on the rates".

STATUTES INVOLVED.

The provisions of Section 20, the closely related Section 19 and the (in the instant case) *unrelated* Section 201, of the Federal Power Act, are set forth in Appendix A [*infra*, 21].

STATEMENT.

Safe Harbor Water Power Corporation, a Pennsylvania corporation, (hereinafter called Safe Harbor), obtained from the Commission, in 1930, a 50-year license to construct and operate a hydroelectric plant on the Susquehanna, near Lancaster, in Pennsylvania. The plant is designed ultimately for twelve units; the "initial development" consisted of six. Construction was begun in 1930, commercial operation of the first four

units in 1932. By 1935 the six had been installed. A seventh has been installed (1939-1940) at the request of the Pennsylvania Railroad [R., Vol. I, 22-23, 268, 287-288, 1-2].

Consolidated Gas Electric Light and Power Company and Pennsylvania Water & Power Company (hereinafter called the Maryland Company and the Pennsylvania Company) own respectively two-thirds and one-third of the capital stock of Safe Harbor; each owns half of the voting stock. In June, 1931, Safe Harbor issued $21,000,000 of first mortgage bonds, due in 1979, guaranteed as to principal and interest by the Maryland Company; the Maryland Company is indemnified by the Pennsylvania Company to the extent of one-third of this guaranty. These bonds were sold, through bankers, to the public. [R., Vol. I, 281].

Under a contract dated June 1, 1931, expiring in 1980, Safe Harbor sells its output, two-thirds to the Maryland Company, delivered in Maryland, one-third to the Pennsylvania Company, delivered in Pennsylvania [R., Vol. II, 70]. This contract was filed with the Commission and with the Maryland Public Service Commission; the Pennsylvania Commission was given detailed information. [R., Vol. I, 326-327]. In effect, through this contract interest and sinking fund payments on Safe Harbor's bonds are guaranteed by the Maryland Company and the Pennsylvania Company. Under the contract annual payments for power were, for the years 1933 to 1937 (the development period) specified lump sums, and for 1938 and thereafter the amount required to yield Safe Harbor

> "a net income of seven per cent., after all reasonable operating expenses, * * * on its accumulated

> actual investment * * *, without regard to the amount of power actually furnished." [R. Vol. II, 64-65].

Though the development period payments yielded *less* than a fair return, Safe Harbor's output was disposed of more promptly and economically through this contract than would otherwise have been possible. In its opinion the Commission says:

> "Safe Harbor Corporation has shown skill and high efficiency in the development and management of its project. During the development period of 1932 to 1939, the increasing capacity of the project was coordinated economically with the existing regional power system." [R., Vol. I, 6, 34].

The Pennsylvania Company sells to the Maryland Company all power (including that purchased from Safe Harbor) not sold to Pennsylvania customers. Pennsylvania customers include the Pennsylvania Railroad and corporations which supply the public at Lancaster, York and Coatesville. The power sold to these Pennsylvania customers does not "enter into interstate commerce". The local companies' rates for power sold in Pennsylvania are subject to regulation by the Pennsylvania commission. The Maryland Company's rates have been regulated by the Maryland commission for over thirty years.

The Instant Proceeding.

On November 9, 1937—before the full contract rate had become effective [*supra*, 3]—the Commission instituted an investigation to determine (*a*) whether the 1931 contract "violates any of the provisions of the Federal Power Act, or any rule, regulation or order of the Commission thereunder" and (*b*) whether any of

Safe Harbor's rates under the contract, "or any rules, regulations and practices" pertaining to such charges "(1) make or grant any undue preference or advantage to any person, or subject any person to any prejudice or disadvantage, or (2) constitute any unreasonable difference in rates, charges, service, or facilities, either as between localities or as between classes of service, or (3) are unjust, unreasonable, or unduly discriminatory." [R., Vol. I, 48-50]. On July 14, 1939 the Commission ordered a hearing to decide (*a*) whether the contract "violates any of the provisions of *Parts I and III**" of the Act [*not* Part II, which includes Section 201] or any rule, regulation or order thereunder, (*b*) whether any of Safe Harbor's rates "are unjust, unreasonable or unduly discriminatory" and (c) determine, and fix, the just and reasonable rates to be made effective [R., Vol. I, 50-51].

At the hearing (before an Examiner), in response to a request by Safe Harbor for a statement of the issues, the Commission's General Counsel made a statement narrowing the issues to the question whether Safe Harbor under the contract "is receiving more than a fair return upon the allowable rate base" *under Part I of the Act*. [R., Vol. I, 54-58]. Later the issues were further narrowed by agreement between counsel. [R., Vol. I, 261-262]. At the hearing the Commission questioned *only* the *amount* of Safe Harbor's rates under the contract (including both the amount of the *base* and the amount of the *percentage* by which the rates are computed) and *not* the method of computation, as a specified

* In this brief all italics are supplied, unless the contrary is stated.

percentage of a specified base instead of demand and energy charges for the amount of power and energy furnished.

In short, the instant case presents (1) no question as to (*a*) the *Shreveport* doctrine [*Houston E. & W. T. Ry. Co. v. United States*, 234 U. S. 342. Cf. *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352-353] or (*b*) any other kind of discrimination, and (2) as the Circuit Court of Appeals rightly holds [R., Vol. I, 679; 124 F. 2d 809], *no question as to Section 201 or Part II of the Federal Power Act.*

At the conclusion of the hearings Safe Harbor moved to dismiss the proceedings for the reason (1) that the Pennsylvania and Maryland commissions have full authority to enforce the requirements of Section 20 within their respective states, and the Commission has no jurisdiction over Safe Harbor under Section 20, and (2) that there is no substantial evidence that any rates under the 1931 contract are unjust, unreasonable or unduly discriminatory [R., Vol. I, 660-661].

On June 17, 1940 the Commission issued its opinion and its order, dated June 11, 1940, requiring Safe Harbor to "revise its filed rate schedule" [*i. e.*, the 1931 contract, which had been filed as a rate schedule] "so as to provide for a 6% return on the average net capital investment in its licensed project plus working capital, as more fully set forth in the * * * opinion" [R., Vol. I, 9, 41].

Application for a rehearing was filed on July 16, 1940 and denied on July 23, 1940 [R., Vol. I, 11]. On September 10, 1940 Safe Harbor filed a petition for review in the Circuit Court of Appeals for the Third Circuit [R., Vol. I, 1-21, 669-670; 124 F. 2d 803].

In the Circuit Court of Appeals the case was heard both (1) on the question of the Commission's jurisdiction and (2) on the merits of the Commission's order. Safe Harbor maintained (1) that under Section 20 the Commission has no jurisdiction to regulate Safe Harbor's rates, but such jurisdiction is conferred upon the Pennsylvania and Maryland commissions and (2) that the Commission's order is confiscatory, arbitrary and unsupported by substantial evidence (*a*) in respect of the maximum return allowed on the *statutory* base, *cost or value whichever is lower*, (*b*) in disregarding the provisions of Section 20—and Sections 14 and 3(13)—in the determination of Safe Harbor's "net investment" and (*c*) in other respects.

The Circuit Court of Appeals [1] set aside the Commission's order as beyond its jurisdiction, [2] without passing upon the merits [R., Vol. I, 679; 124 F. 2d 809]. At this stage of the case, therefore, Safe Harbor will not discuss the merits of the Commission's order.

ARGUMENT.

Section 20 provides: "That when said power ['developed' by a licensee] or any part thereof shall enter into interstate * * * commerce the rates charged * * * by any such licensee, or by any subsidiary * * * controlled * * * by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates * * * are hereby prohibited and declared to be unlawful; and [1] whenever any of the States directly concerned has not provided a commission * * *

to enforce the requirements of this section within such State * * *, or [2] such States are unable to agree through their properly constituted authorities * * * on the services to be rendered or on the rates * * * therefor, * * * jurisdiction is hereby conferred upon the commission * * * to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates * * * therefor as constitute interstate * * * commerce * * *." [Bracketed numbers supplied].

The facts are: [1] Each of "the States directly concerned", viz., Pennsylvania and Maryland, *has* "provided a commission * * * to enforce the requirements of this section within such State"; [2] "such States are" *not* "unable to agree through their properly constituted authorities * * * on the rates". Consequently, "jurisdiction is" *not* "conferred upon the Commission * * * to enforce the provisions of this section". The lower Court so held [R., Vol. I, 672-679; 124 F. 2d 805-808]. This decision was clearly correct.

A.

The Commission says that in the construction of a statute effect must be given to the intent of Congress, even when contrary to the plain meaning of the words.[1] Such an intent, however, is not lightly to be inferred.[2] "While one may not end with the words of a disputed statute, one certain begins there".[3]

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[1] *United States v. American Trucking Associations*, 310 U. S. 534, 542-544; *United States v. Dickerson*, 310 U. S. 554, 561-562; *United States v. N. E. Rosenblum Truck Lines*, — U. S. —, 62 S. Ct. 445, 449.

[2] *United States v. American Trucking Associations*, 310 U. S. 542-544.

[3] *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 350.

The Commission contends that in Section 20 the intent of Congress was (1) to "leave" with the states only the jurisdiction they already possessed in "the silence of Congress" and (2) to confer upon the Commission all other jurisdiction over interstate rates. This was substantially the scope of the Interstate Commerce Act *before* the passage of the Transportation Act of 1920,[4] except that to the extent of the *Shreveport* doctrine state jurisdiction had been narrowed and federal jurisdiction enlarged.[5] This was also substantially the scope of the Shields bill,[6] which passed the Senate on December 14, 1917, and by which licensees' rates were made subject to state regulation, except where the power entered into interstate commerce, in which case the Interstate Commerce Commission was given jurisdiction.[7] The scope of the Shields bill in this respect was radically changed in the first substitute bill reported in the House[8], and was never restored in the course of the legislative proceedings that culminated in the passage of the Federal Water Power Act of 1920.

The alleged intent of Congress in Section 20 never existed; it is an afterthought of the Commission. The words of the statute accurately express the actual intent of Congress, which was quite different from the original Shields bill. In Sections 19 and 20 of the Federal Water Power Act, Congress for the second time within a few months made a new departure from the division line

[4] February 28, 1920, c. 91, 41 Stat. 456.

[5] *Wisconsin Railroad Commission v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 579-589.

[6] S. 1419. R., Vol. I, 674; 124 F. 2d 806.

[7] Senate Report No. 179, 65th Congress, 2d Session, p. 4, December 12, 1917. See also Congressional Record, Volume 56, Part 1, p. 284.

[8] House Report No. 715, 65th Congress, 2nd Session, June 28, 1918.

between state and federal jurisdiction in the silence of Congress. In the Transportation Act of 1920, Congress had materially narrowed state jurisdiction and broadened federal jurisdiction in the predominantly national problem of railroad rate regulation.[9] In Sections 19 and 20 of the Federal Water Power Act of 1920, Congress selected a new criterion in drawing the line between state and federal jurisdiction in the predominantly—and ultimately—local[10] problem of electric rate regulation. Instead of drawing this line between intrastate and interstate commerce, Congress made the same division of jurisdiction with respect to *both* intrastate and interstate commerce. The single criterion is whether or not the states *have provided commissions* to exercise such jurisdiction. When the states have provided commissions, then the state commissions under Section 19 have jurisdiction over intrastate rates, and under Section 20 have jurisdiction when the power has entered into interstate commerce. If the states have not provided commissions (or if, when the power has entered into interstate commerce, states directly concerned are unable to agree through their commissions on the rates), then the Federal Power Commission under Section 19 has jurisdiction, even over intrastate rates, and under Section 20 has jurisdiction when the power has entered into interstate commerce.

In selecting this single criterion Congress obviously departed *in both directions* from the division line in the

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[9] *Wisconsin Railroad Commission v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585.

[10] See Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments", 34 Yale Law Journal 685, 712-715, note 117; Selected Essays on Constitutional Law, Vol. 3, pp. 1606, 1633-1636.

silence of Congress. When a state has *not* provided a commission, the license is made a *contractual* basis for extending federal jurisdiction to *intrastate* rates. When states have provided commissions, state jurisdiction is expanded by removal of restrictions by *permission* of Congress. The power of Congress to regulate commerce by permitting particular matters to be subject to local regulation by the states had been established by this Court before 1920[11], has been reaffirmed since[12] and has been exercised from the beginning of the Government.[13] Matters which may be so regulated include rates[14] and other utility regulation;[15] even in the silence of Congress *some* interstate rates can be regulated by the states.[16]

If there be any difference between "leaving" jurisdiction with the states and "conferring" jurisdiction upon the states, then jurisdiction "to enforce the requirements" of an *Act of Congress* is "conferred" by *permission* of Congress. In conferring jurisdiction upon the Federal Power Commission when the states have *not* "pro-

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[11] *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 325-332, decided January 8, 1917; *In re Rahrer*, 140 U. S. 545.

[12] *Whitfield v. Ohio*, 297 U. S. 431, 439-440; *Whip & Collar Co. v. I. C. R. Co.*, 299 U. S. 334, 349-351; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 313-314.

[13] Act of August 7, 1789, 1 Stat. 54, §4; *Cooley v. Board of Port Wardens*, 12 How. 299, 317. Acts of 1796, 2 Stat. 545, and 1799, 3 Stat. 126; *Gibbons v. Ogden*, 9 Wheat. 1, 205. Acts of 1803, 2 Stat. 205; *The Brig Wilson*, 1 Brockenbrough, 423, 437, per MARSHALL, C. J. Act of July 3, 1866, c. 162, §5, 14 Stat. 82; R. S. §4280; 46 U. S. C. A. §174.

[14] *Covington etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 209, 223.

[15] *Inter-Island Co. v. Hawaii*, 305 U. S. 306.

[16] *Port Richmond Ferry v. Hudson County*, 234 U. S. 317, 330-331-332; *Wilmington Transp. Co. v. Railroad Commission of California*, 236 U. S. 151, 153-157. Cf. *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, — U. S. —, 62 S. Ct. 384, 387.

vided a commission to enforce the requirements of this section", Congress expressed its intent that when the states *have* provided commissions, the commissions *may* "enforce the requirements of this section".

B.

In 1929 the Commission "approved as a decision of the commission" an opinion of its counsel[17] which (giving no effect to the *words* of Section 20 or the *permission* of Congress) reached the conclusion that the jurisdiction of state commissions *under Section 20* is limited by the decisions applicable *in the silence of Congress.*[18] As the Circuit Court of Appeals says, this opinion of counsel was never "enforced by actual order and for this reason represented theory rather than practice" [R., Vol. I, 679; 124 F. 2d 808].[19] Indeed this opinion was never acted upon at all by the Commission.

Section 20, as enacted in 1920, has never been amended or even reenacted. The Act of 1935 left it unchanged. Apparently it was not discussed in the debates or committee reports on the Act of 1935.[20] For seventeen years

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[17] Federal Power Commission, Ninth Annual Report (1929), pp. 36, 119-131.

[18] *E. g., Public Utilities Commission v. Attleboro Co.*, 273 U. S. 83; *Missouri v. Kansas Gas Co.*, 265 U. S. 298; *Pennsylvania Gas Co. v. Public Service Commission*, 253 U. S. 23.

[19] See also *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352.

[20] Mr. DeVane, Solicitor for the Commission, in the course of his statement before the House Committee said: "The Commission has interpreted this law [Section *19*] as giving its jurisdiction in cases that fall within the principles announced by the Supreme Court in the Attleboro case, referred to by me on yesterday." [Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Congress, 1st Session, p. 510]. On the strength of this remark the Commission says that the 1929 opinion of its counsel was "called to Congressional attention before Section 20 was reenacted [*sic*] in 1935". [Petition, p. 17].

—until the institution of the instant proceedings in 1937 —the Commission never attempted to exercise rate-making jurisdiction under Section 20.

The Commission now sets up this 1929 opinion as an "administrative construction" of Section 20. This is "administrative construction" run riot. Not only was this opinion never acted upon by the Commission; the same Annual Report (1929) that contains this opinion (as an appendix) also contains a discussion of "Regulatory Jurisdiction of the Commission" [Appendix B; *infra*, 25]. In this discussion the opinion of counsel is not mentioned or referred to; the administrative *practice* shown and the view taken of the statute are in accord with the *words* of the statute and the decision of the Circuit Court of Appeals. The notion that the *Attleboro* case affected the construction of Section 20 or presented any new problem is not suggested, but is in effect excluded.

> "* * * Very wisely, Congress by the act subordinated the regulatory powers of the commission to the jurisdiction exercised by the several States. * * * Relative to licensees engaged in interstate public-utility business section 20 of the act authorized the commission to perform regulatory functions only when one of the States concerned has not created proper regulatory authority or when the States are unable to agree between themselves.
>
> "It seems clear, therefore, that Congress thought of the control of electrical utilities as a local problem and that the imposition of a superior authority would be needed only in the event of disputes between States. Doubtless it was recognized that electric power must of necessity be used in the immediate vicinity of its production and that its transportation lacks the complicated interstate relations

affecting large groups of States, as in the case of railroad transportation. Being a local problem it was considered that its control might best be attained by local responsibility and local opinion.

"During the nine years that have passed since the enactment of the law its administration has suggested no need for altering the present scope of its regulatory provisions. Necessarily, the activities of this character have been small under the limited jurisdiction conferred. * * *

* * *

"* * * The only case of an interstate character in which the commission has been called upon to participate concerned the Conowingo plant, where some cooperation was extended to the Maryland and Pennsylvania public-service commissions relative to the control of security issues and rate agreements." [Appendix B; *infra*, 25-26].

The ground for the Commission's jurisdiction in the Conowingo case was failure of the State of Pennsylvania to "provide a commission" to regulate issuance of securities. [Appendix C; *infra*, 26-27. Exhibit No. 32; R., Vol. II, 394, 395, 397].

In short, *the only actual administrative practice* shown is that *for seventeen years the Commission never attempted to exercise the jurisdiction now asserted.*

C.

Mr. Sherbow, People's Counsel[21] to the Maryland Public Service Commission (*not* counsel for the commission) intervened in the instant proceedings before the Commission and filed a brief and made an oral argument, as

[21] Annotated Code of Maryland (Edition of 1939), Art. 23, Sec. 353.

amicus curiae, in the lower Court. Having subsequently become General Counsel for the Maryland commission, he has filed a memorandum in this Court in support of the petition for certiorari.

The Maryland commission has not hitherto taken the limited view of its own jurisdiction now taken by its counsel. In the Conowingo case in 1926, the Maryland commission in its opinion accompanied its *action* by a *contemporaneous construction* of Sections 19 and 20. After quoting Section 19 as establishing control by the Maryland commission over current generated and delivered in Maryland, the commission said:

> "In the event interstate complications should develop in a direction other than the supplying of Maryland consumers with current from the project, Section 20 provides for the settlement of those matters by the regulatory agencies of the states affected. *Only when such state regulatory bodies do not exist,* or the states cannot agree among themselves does the Federal Power Commission step in to regulate them." [Exhibit No. 30; R. Vol. II, 331-349].

Safe Harbor and the Pennsylvania Company each have an office in Maryland, sell and deliver power in Maryland [*supra*, 3, 4], and have designated an agent for service of process under the Maryland foreign corporation law, which in this respect is applicable to corporations doing either intrastate or interstate business in Maryland.[22] The Maryland Company has purchased power from the Pennsylvania Company for more than thirty years and from Safe Harbor for ten years. Throughout this period the Maryland commission has

[22] Annotated Code of Maryland (Edition of 1939), Art. 23, Section 119. *International Harvester Co. v. Kentucky*, 234 U. S. 579.

regulated the Maryland Company's rates, and in so doing has fully investigated and indirectly regulated the wholesale rates paid for power.[23]

D.

The intent of Congress, clearly expressed in the words of Sections 19 and 20, was to insure *unified* regulation—and avoid *duplicate* regulation—of licensees' rates, both intrastate and interstate, by state commissions (when the states provide commissions) or by the Federal Power Commission if the states do not provide commissions or if their commissions disagree. The Commission's assertion of jurisdiction in the instant case would defeat the intent of Congress. Safe Harbor sells only to its two stockholders, the Pennsylvania Company and the Maryland Company, both of which are subject to local regulation. Regulation of Safe Harbor's rates by the Federal Power Commission *can affect no public interest* and *can have no practical effect at all*, except as constituting an *item* in the ultimate *local* regulation of *local* rates to the public. The net result of establishing the jurisdiction asserted by the Commission would be merely to *duplicate complete* regulation, by the Pennsylvania and Maryland commissions, by *partial* regulation by the Federal Power Commission.

E.

Referring to the provisions of Section 20 that make the jurisdiction of the Commission dependent upon the in-

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[23] Cf. *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 151-157; *Western Distributing Co. v. Commission*, 285 U. S. 119, 123-125, 126-127; *Dayton P. & L. Co. v. Commission*, 292 U. S. 290, 295; *Columbus G. & E. Co. v. Commission*, 292 U. S. 398, 400-401, 414-415; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 306-308; *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 236-242.

ability of the states "to agree on the rates", the lower Court says, "Such an agreement would be a compact"; explains that "a compact like an agreement may be deemed to arise out of actions which are quite informal"; and concludes that if Pennsylvania and Maryland, through their respective commissions, "have agreed informally, by cooperative or identical actions", to regulate Safe Harbor's rates, "such would be within the perview of the compact clause and the permission given by Congress by Section 20" [R., Vol. I, 678; 124 F. 2d 808]. The Commission faintly suggests doubt as to whether state commissions, consistently with due process, can "agree on rates" through compacts [Petition, pp. 10-11, note 4]. Whether "agreement on rates" by identical actions would be a "compact" is an academic verbal question. Certainly it would be "within the permission given by Congress by Section 20". Due process does not require that two commissions, in the supposedly rational process of decision upon evidence, must reach different results. When two federal courts are "unable to agree" on a question of law, this Court has jurisdiction; when two state commissions are "unable to agree on rates", the Federal Power Commission has jurisdiction.

F.

In the instant case the Commission's ultimate objective apparently is not Section 20 (enacted in 1920), but Section 201 (enacted in 1935). [Petition, pp. 7, 8, 11-12]. The Commission would resolve ambiguities in Section 201 by distorting the unambiguous *words* and *intent* of Section 20. As the Circuit Court of Appeals says, questions under Part II (including Section 201) "are not properly in this case". [R., Vol. I, 679; 124 F. 2d 809]. The Commission in this case has *not* attempted to exercise

any authority under Section 201 [Petition, p. 8]. At and before the hearing the Commission studiously excluded Part II and limited the issues to Part I [*supra*, 5].

Whether or not any ambiguities in Section 201 can be clarified by Section 20, are questions that may be decided in some case in which they actually arise. There may be no physical difference between electricity generated by licensees and other electricity. There is, however, little legal or verbal similarity between Sections 19 and 20 and Section 201. The basis for regulation of rates of licensees under Part I—but *not* of public utilities under Part II—is *contractual* [*supra*, 11].

Section 201 furnishes no color for distorting the plain meaning of Section 20 so as to enlarge the Commission's jurisdiction and encroach upon the jurisdiction of state commissions. The Federal Water Power Act of 1920 was amended by Title II of the Public Utility Act of 1935[24]; Title II, entitled "Amendments to Federal Water Power Act", includes amendments to various provisions of the Federal Water Power Act (now Part I of the Federal Power Act) and the addition of Parts II (including Section 201) and III of the Federal Power Act.

Concerning the purpose of Title II of the Act of 1935, the report of the House Committee said:

> "*The amendments to the present Federal Water Power Act are all minor.* They have been requested by The Federal Power Commission, largely for the purpose of clarifying the Act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars * * *.
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> * * *

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[24] August 26, 1935, c. 687, 49 Stat. 797.

> "The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. Provision is made for joint boards composed of members of State Commissions which may be used for this purpose. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State Commissions. *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does Title II of this bill.*"[25]

Notwithstanding assurances by the Commission's spokesmen that the bill, as presented by the Commission, did not encroach upon the jurisdiction of state commissions, Congress revised the bill, as so presented, by adding at the end of Section 201(a) the proviso,

> "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

Concerning this revision, the Senate report said:

> "* * * The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the State. * * *"[26]

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[25] House Report No. 1318, 74th Congress 1st Session, pp. 7-8.
[26] Senate Report No. 621, 74th Congress, 1st Session, p. 18.

CONCLUSION.

The decision of the lower Court is clearly correct. There is no conflict of decisions. The decision below gives effect to (1) the plain meaning of the words of the statute, (2) the equally clear intent of Congress and (3) the Commission's own actual practice for seventeen years.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX A.

UNITED STATES STATUTES.

FEDERAL POWER ACT (OF 1935), SECTION 19. (FEDERAL WATER POWER ACT, OF 1920, SECTION 19, NOT CHANGED BY ACT OF 1935).

[16 U. S. C. A. §812, June 10, 1920, c. 285, §19, 41 Stat. 1073.]

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

FEDERAL POWER ACT (OF 1935), SECTION 20. (FEDERAL WATER POWER ACT OF 1920, SECTION 20, NOT CHANGED BY ACT OF 1935.)

[16 U. C. S. A. §813, June 10, 1920, c. 285, §20, 41 Stat. 1073.]

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure

and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Federal Power Act (of 1935), Section 201. (Added by Act of 1935.)

[16 U. S. C. A. (Supp.) §824, as added August 26, 1935, c. 687, Title II, §213, 49 Stat. 847].

Sec. 201. *Declaration of policy, application of part; definitions.*

(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

APPENDIX B.

NINTH ANNUAL REPORT OF THE FEDERAL POWER COMMISSION TO CONGRESS (1929), pp. 5-6.

REGULATORY JURISDICTION OF COMMISSION.

In the eighth annual report of the commission the regulatory jurisdiction conferred under the act was discussed at considerable length. It was pointed out that to attempt the exercise of regulation over rates, service, or security issues in a limited number of isolated cases scattered throughout the country would quite likely involve unreasonable expense and delay. Very wisely, Congress by the act subordinated the regulatory powers of the commission to the jurisdiction exercised by the several States. It expressly provided in section 19 that this commission might undertake control over the rates, service, or security issues of public-utility licensees engaged in intrastate business only until the State concerned had authorized a commission or other agencies to exercise such regulation. Relative to licensees engaged in interstate public-utility business section 20 of the act authorized the commission to perform regulatory functions only when one of the States concerned has not created proper regulatory authority or when the States are unable to agree between themselves.

It seems clear, therefore, that Congress thought of the control of electrical utilities as a local problem and that the imposition of a superior authority would be needed only in the event of disputes between States. Doubtless it was recognized that electric power must of necessity be used in the immediate vicinity of its production and that its transportation lacks the complicated interstate relations affecting large groups of States, as in the case of railroad transportation. Being a local problem it was considered that its control might best be attained by local responsibility and local opinion.

During the nine years that have passed since the enactment of the law its administration has suggested no need for altering the present scope of its regulatory provisions. Necessarily, the activities of this character have been small under the limited jurisdiction conferred. Practically all of the States in which power plants are being operated under license authorization have duly constituted agencies to control the service rendered and rates charged to consumers.

As a matter of fact, the generating capacity operating under license from the commission comprises such a small portion of the total in public-utility service throughout the country that it would hardly be considered more than a minor factor under any circumstances. This is best illustrated by reference to Table No. 2 on the following page.

It will be observed that the 75 plants operating under license from the commission are confined to 21 of the States and have aggregate capacity of about 2,500,000 horsepower. This represents slightly less than 25 per cent of the total water-power capacity and only 6.3 per cent of the total capacity in public-utility service. State regulatory commissions are functioning in each one of the States containing licensed public-utility plants with the exception of Kentucky and Minnesota, where local community control is practiced. The only case of an interstate character in which the commission has been called upon to participate concerned the Conowingo plant, where some cooperation was extended to the Maryland and Pennsylvania public-service commissions relative to the control of security issues and rate agreements.

APPENDIX C.

Concerning the Conowingo case the Federal Power Commission, in its Sixth Annual Report, said *inter alia:*

> "Such jurisdiction or power is limited to those cases where there is no State agency authorized to

regulate security issues. The first exercise by the commission of this authority occurred during the fiscal year covered by this report and in connection with what is known as the 'Conowingo project' now being constructed on the Susquehanna River a few miles above tidewater, near the village of Conowingo, Md."

* * *

"The Maryland commission has jurisdiction over the issuance of securities by public-utility corporations in that State, but the Pennsylvania commission has no such authority." [Exhibit No. 32; A. II, 394, 395, 397.]